

SHAWNA HUDSON,
Plaintiff,
v.
MICHAEL J. ASTRUE, Commissioner
of Social Security,
Defendant.

No. CV-11-0025-CI
ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT
AND GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

JURISDICTION

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND
GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT - 1

20, 2001. (Tr. 180.) Benefits were denied initially and on reconsideration. Plaintiff timely requested a hearing before an administrative law judge (ALJ), which was held before ALJ R.S. Chester on October 21, 2008. (Tr. 24, 38-73.) Plaintiff, who was represented by counsel, and vocational expert K. Diane Kramer (VE) testified. The ALJ denied benefits on December 18, 2008, and the Appeals Council denied review. (Tr. 1-5, 24-37.) The instant matter is before this court pursuant to 42 U.S.C. § 405(g).

STANDARD OF REVIEW

In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the court set out the standard of review:

A district court's order upholding the Commissioner's denial of benefits is reviewed *de novo*. *Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the Commissioner may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, although deference is owed to a reasonable construction of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

It is the role of the trier of fact, not this court, to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the court may not

1 substitute its judgment for that of the Commissioner. *Tackett*, 180
2 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
3 Nevertheless, a decision supported by substantial evidence will
4 still be set aside if the proper legal standards were not applied in
5 weighing the evidence and making the decision. *Browner v. Secretary*
6 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
7 there is substantial evidence to support the administrative
8 findings, or if there is conflicting evidence that will support a
9 finding of either disability or non-disability, the finding of the
10 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
11 1230 (9th Cir. 1987).

12 SEQUENTIAL EVALUATION

13 The Commissioner has established a five-step sequential
14 evaluation process for determining whether a person is disabled. 20
15 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
16 137, 140-42 (1987). In steps one through four, the burden of proof
17 rests upon the claimant to establish a prima facie case of
18 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d
19 920, 921 (9th Cir. 1971). This burden is met once a claimant
20 establishes that a physical or mental impairment prevents her from
21 engaging in her previous occupation. 20 C.F.R. §§ 404.1520(a),
22 416.920(a). At step five, the burden shifts to the Commissioner to
23 show that (1) the claimant can perform other substantial gainful
24 activity; and (2) a "significant number of jobs exist in the
25 national economy" which claimant can perform. 20 C.F.R. §§
26 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496,
27 1498 (9th Cir. 1984).

STATEMENT OF THE CASE

The facts of the case are set forth in detail in the transcript of proceedings and are briefly summarized here. At the time of the hearing, Plaintiff was 45 years old, unmarried, and without children. She testified she lived alone in a house owned by her parents who were living in Arizona. (Tr. 43-45.) Plaintiff has a high school education and a cosmetology license. She has work experience as a sales clerk, receptionist, real estate clerk, design consultant, and costumer assistant. (Tr. 63, 186.) She testified she lost her last job because she missed work due to her depression that was not responding to treatment. (Tr. 50.) She stated she could no longer sustain work due to depression and back pain. (Tr. 48-49.)

ADMINISTRATIVE DECISION

The ALJ determined Plaintiff met the insured status requirements for DIB through September 30, 2002. At step one, he found Plaintiff had not engaged in substantial gainful activity since the alleged onset date. (Tr. 26.) At step two, he found Plaintiff had severe impairments of "major depressive disorder; generalized anxiety disorder with panic attacks; undifferentiated somatoform disorder; personality disorder with borderline, histrionic schizoid and dependent features; and post traumatic coccydynia." (*Id.*) At step three, he found Plaintiff's impairments, alone and in combination, did not meet or medically equal one of the listed impairments in 20 C.F.R., Appendix 1, Subpart P, Regulations No. 4 (Listings). (Tr. 28.) The ALJ summarized medical evidence submitted and Plaintiff's testimony and concluded her subjective

1 symptom complaints were not credible to the extent they were
2 inconsistent with the residual functional capacity (RFC) findings.
3 (Tr. 31-34.) At step four, the ALJ determined she had the RFC to
4 perform light work with a sit-stand option that required only
5 superficial contact with the general public and limited
6 collaboration with co-workers. (Tr. 31.) Based on this RFC and VE
7 testimony, the ALJ concluded Plaintiff could perform her past work
8 as a sales clerk, receptionist, real estate clerk, and costumer
9 assistant. He concluded Plaintiff was not disabled, as defined by
10 the Social Security Act, at any time from November 20, 2001, through
11 the date of his decision. (Tr. 37.)

12 **ISSUES**

13 The question is whether the ALJ's decision is supported by
14 substantial evidence and free of legal error. Although Plaintiff's
15 representative fails to list with specificity under separate heading
16 in her briefing the issues on appeal, it appears Plaintiff argues
17 the ALJ erred in the weight given to treating and examining medical
18 providers in the final RFC determination. ECF No. 16 at 12-23.
19 Defendant argues the ALJ's RFC determination and weight given
20 medical opinions are supported by substantial evidence in the
21 record. ECF No. 21. The issue of new evidence presented to the
22 Appeals Council is also before the court. ECF No. 16 at 21; ECF No.
23 21 at 17-18.

24 **DISCUSSION**

25 **A. Evaluation of Medical Evidence**

26 In determining what limitations, if any, prevent a claimant
27 from performing work tasks, the ALJ evaluates the record in its
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entirety. Limitations must be caused by a medically determinable impairment, so the evaluation of medical evidence is a critical factor, although it is not the only factor considered. 20 C.F.R. §§ 1545, 416.945; SSR 96-5p. In evaluating the weight given to medical opinions, the ALJ may reject or discount opinions of acceptable medical sources in the record by articulating "clear and convincing" reasons for rejecting the uncontradicted opinions of treating or examining physicians. If the opinions are contradicted, the reasons must be "specific" and "legitimate." *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995); *Andrews*, 53 F.3d at 1043. The opinions of non-examining reviewing physicians/psychologists may serve as substantial evidence when supported by and consistent with other evidence in the record. 20 C.F.R. §§ 404.1527(e), 416.927(e); *Andrews*, 53 F.3d at 1041. A treating physician's opinion carries more weight than an examining physician's, and an examining physician's opinion carries more weight than a non-examining reviewing or consulting physician's opinion. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004); *Lester*, 81 F.3d at 830. Medical opinions based on a claimant's subjective complaints may be rejected where the claimant's credibility has been properly discounted.¹

¹ The ALJ's credibility findings are unchallenged and supported by specific and detailed reasoning. (Tr. 31-34.) The ALJ properly gave numerous legally sufficient reasons for discounting the severity alleged by Plaintiff at the hearing and in the record, including inconsistencies between her activities and the degree of disability alleged, the reported effectiveness of medication and

1 *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001). Further,
2 where an ALJ determines medical source opinions are materially
3 inconsistent with clinic notes, narrative summaries, or objective
4 test results, legitimate grounds exist discounting those opinions.
5 *Tommasetti*, 533 F.3d at 1041.

6 In addition to licensed medical sources, the ALJ must give
7 "germane," specific reasons for rejecting the opinions of "other
8 medical sources" such as nurse practitioners, mental health
9 therapists and physician assistants regarding how a claimant's
10 impairments limit his or her ability to work. 20 C.F.R. §§
11 404.1513(d), 416.913(d); *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir.
12 2001); *SSR* 06-03p.

13 **1. John Arnold, Ph.D.**

14 Plaintiff claims the ALJ erroneously rejected the opinions of
15 her treating psychologist, Dr. Arnold. The record shows the ALJ
16 accepted Dr. Arnold's diagnoses based on psychological testing, but
17 gave less weight to the functional limitations marked on pre-printed
18 forms. Specifically, the ALJ found functional limitations assessed
19 were not consistent with Dr. Arnold's narrative reports which
20 include objective testing results showing a questionable validity
21 and an exaggeration of symptoms and an assessment of moderate
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25 physical therapy, and a lack of objective medical findings
26 commensurate with the limitations alleged. *Id.*; *Tommasetti v.*
27 *Astrue*, 533 F.3d 1035, 1039-40 (9th Cir. 2008)(describing two step
28 analysis of a claimant's credibility).

1 difficulties in social and occupational functioning.² (Tr. 33, 35,
2 383.) In addition, he found although Dr. Arnold's diagnoses and
3 report of symptoms remained essentially the same over the years, the
4 limitations on the check box form became more severe without
5 explanation. (Tr. 35.) These reasons for discounting those
6 limitations considered "marked" and "severe" are legitimate and
7 specific.³

8 The ALJ's reasons are amply supported by the record. As noted
9 by the ALJ, objective test results administered by Dr. Arnold were
10 interpreted as indicating exaggeration and embellishment of
11 symptoms, which lead Dr. Arnold, in his narrative, to characterize
12 the personality profile as "questionably valid." (Tr. 33, 382-83.)
13 The ALJ also found that although Plaintiff claimed she attended

14 ² Because Dr. Arnold's observations and narrative findings of
15 moderate symptoms, the ALJ could logically find the moderate
16 limitations in the form report are consistent with the narrative
17 findings. *Tommasetti*, 533 F.3d 1035, 1040 (2008) (the ALJ is
18 allowed to draw inferences reasonably flowing from the evidence).
19 Further, the court can read from the ALJ's summary of the evidence
20 and draw inferences relative to the psychologist's findings.
21 *Magallanes v. Bowen*, 881 F.2d 747, 755 (9th Cir. 1989).

22 ³ The degree of functional limitation assessed by Dr. Arnold
23 is contradicted by agency psychologist, Dr. Mary Gentile, Ph.D., who
24 reviewed Dr. Arnold's report and test results and concluded
25 Plaintiff was capable of simple work tasks away from the public.
26 (Tr. 312.) The ALJ's rejection of Dr. Arnold's conclusions with
27 specific and legitimate reasons is proper. *Lester*, 81 F.3d at 831.
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1 counseling with Dr. Arnold two to three times a week, the records
2 show a gap in treatment between 2002 and 2006, and few visits with
3 Dr. Arnold between January 2006 and March 2007. (Tr. 33.) At the
4 hearing, Plaintiff indicated additional records from Dr. Arnold were
5 requested for the file, but it appears no treatment notes from a Dr.
6 Arnold were received by the ALJ for consideration. (Tr. 61.) The
7 ALJ's reasoning for discounting limitations assessed by Dr. Arnold
8 is specific and legitimate and supported by substantial evidence.
9 His findings are therefore conclusive. *Sprague*, 812 F.2d at 1229-
10 1230 (ALJ's conclusion upheld if it is a rational interpretation of
11 conflicting evidence).

12 **2. Frank Rosekrans, Ph.D. and Sheri Hoveskeland, MS, CDP**

13 Plaintiff next argues Dr. Rosekrans' opinions that she was not
14 stable enough to work at the time of the evaluation were not
15 properly rejected and should be credited. ECF No. 16 at 19. Review
16 of the record shows Dr. Rosekrans' associate, Sheri Hoveskeland,
17 interviewed Plaintiff and administered objective psychological tests
18 in February 2005. (Tr. 367-76.) In the accompanying form report,
19 Ms. Hoveskeland found severe functional limitations in Plaintiff's
20 ability to perform routine tasks and care for herself and marked
21 limitations in her ability to respond and tolerate pressures in the
22 work setting. (Tr. 375.) Although Dr. Rosekrans adopted findings
23 in Ms. Hoveskeland's narrative report and co-signed the form report,
24 the findings are treated as those of Ms. Hoveskeland.

25 Ms. Hoveskeland is not an acceptable medical source under the
26 Commissioner's regulations (Regulations). 20 C.F.R. §§ 404.1513(d),
27 416.913(d). Although Dr. Rosekrans adopted Ms. Hoveskeland's
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1 findings, there is no evidence he observed, examined, or treated
2 Plaintiff; therefore, he is not considered an examining psychologist
3 under the Regulations. 20 C.F.R. §§ 404.1527(c)(1), 416.927(c)(1).⁴
4 Further, the record indicates that Dr. Rosekrans' signature on the
5 form report serves as authorization to release the information to
6 the Board of Veteran's Appeals. (Tr. 376.)

7 As an "other source," Ms. Hoveskeland's observations and
8 opinions regarding how a claimant's impairments affect her ability
9 to work must be considered and can be rejected only with "germane"
10 and "specific" reasons. *Lewis*, 236 F.3d at 511. The ALJ found the
11 marked and severe functional limitations assessed by Ms. Hoveskeland
12 were not consistent with her narrative report or results of
13 objective tests administered. This is a germane, specific, and
14 legitimate reason for giving the severe and marked limitations on
15 the form report little weight. *Lewis*, 236 F.3d at 511; *Nguyen v.*
16 *Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). *De novo* review shows
17 substantial evidence in the narrative report supports the ALJ's
18 rejection of those limitations. As noted by the ALJ, Ms. Hoveskeland
19 observed moderate symptoms, as measured by the global assessment of

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21 ⁴ Even if the report signed by Ms. Hoveskeland and endorsed
22 Dr. Rosekrans were considered the findings of an "interdisciplinary
23 team," as applied in *Gomez v. Chater*, 74 F.3d 967, 971 (9th Cir.
24 1996), 20 C.F.R. §§ 404.1513(a) and 416.913(a) have been amended
25 since the *Gomez* decision, and the Commissioner no longer includes
26 "interdisciplinary team," under the definition of "acceptable
27 medical sources." See 20 C.F.R. §§ 404.1513(a)(1-5),
28 416.913(a)(1-5).

1 functioning (GAF) evaluation tool;⁵ objective testing revealed
2 exaggeration of symptoms; and Plaintiff reported improvement of
3 depression symptoms with medication. (Tr. 368.) Further, de novo
4 review shows there is nothing to indicate Plaintiff has severe
5 problems attending to personal hygiene. In fact, Plaintiff reported
6 "some difficulty" with household chores and self care due to back
7 pain. (Tr. 368.) These discrepancies between the narrative report
8 and the checked limitations are legitimate reasons to reject the Ms.
9 Hoveskeland's severe and marked limitation. See *Bayliss v. Barnhart*,
10 427 F.3d 1211, 1216 (9th Cir. 2005) (rejecting treating physician's
11 opinion based inconsistency with clinic notes). The ALJ's evaluation
12 of the Hoveskeland/Rosekrans report is without legal error.

13 **3. Jolie Ewart, ARNP**

14 The record shows Ms. Ewart provided ongoing treatment and
15 medication management for Plaintiff at the medical clinic during the
16 period at issue. Her notes document treatment for various medical
17 problems, including back pain and depression. (Tr. 202, 279-96,
18 315-34, 391-96, 412-19.) Plaintiff argues the ALJ improperly
19 rejected Ms. Ewart's opinion that Plaintiff was limited to sedentary
20 work. ECF No. 16 at 22; see Tr. 414. Although Plaintiff refers to
21 Ms. Ewart as a treating source whose opinions should be given more
22 weight than examining physician Robert Rose, M.D., *id.*, the record
23 shows Ms. Ewart is a nurse practitioner whose opinions are given

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25 ⁵ The GAF scale is a common tool for tracking and evaluating
26 the overall psychological functioning of a patient and is used to
27 determine an individual's need for treatment. *Vargas v. Lambert*,
28 159 F.3d 1161, 1164 n.2 (9th Cir. 1998).

1 less weight than the opinions of an acceptable medical source; may
2 not establish disability; and may be discounted with specific and
3 germane reasons supported by the record. 29 C.F.R. §§ 404.1513(d),
4 41.913(d); SSR 06-03p.

5 The ALJ summarized, in detail, records from Ms. Ewart and the
6 examining report and findings from Dr. Rose. (Tr. 34-35.) After
7 specifying several examples of inconsistencies between objective
8 medical evidence and Ms. Ewart's clinic notes and her conclusion
9 that Plaintiff would be limited to sedentary work, the ALJ found her
10 opinions warranted less weight than the professional examining
11 opinions of Dr. Rose. Review of Dr. Rose's August 2008 evaluation
12 shows Dr. Rose conducted an in-depth examination of Plaintiff's
13 back, spine and extremities and found no objective findings or
14 medical source data to establish anatomic abnormalities or support
15 the degree of symptom complaints. (Tr. 398-99.) He also completed
16 a medical source statement opining Plaintiff could lift and carry up
17 to 20 pounds and walk, sit and stand up to six hours in an 8-hour
18 work day. (Tr. 400-401.) Dr. Rose's RFC opinions are supported by
19 his examination report and reflected in the ALJ's final RFC limiting
20 Plaintiff to light work with a sit stand option. (Tr. 31.)

21 Plaintiff contends it was error to give Ms Ewart's
22 interpretation of the medical evidence less weight than Dr. Rose's
23 opinions because Dr. Rose saw her only one time. ECF No. 16 at 22;
24 ECF No. 22 at 4. However, due to his status as an examining
25 acceptable medical source, the thoroughness with which he evaluated
26 Plaintiff's physical capacity, his review of imaging reports, and
27 other supporting documentation in the record, Dr. Rose's opinions
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1 warrant more weight than those of Ms. Ewart. (Tr. 394, 398-99, 400-
2 08); 20 C.F.R. §§ 404.1527(d)(4),(e), 416.927(d)(4),(e); *Turner v.*
3 *Commissioner of Social Sec.*, 613 F.3d 1217, (acceptable medical
4 source opinion required to refute ALJ's RFC finding); *SSR 06-03p*
5 (entire record considered in evaluating other sources who are not
6 acceptable medical sources). The ALJ's explanation of the weight
7 given to Ms. Ewart's opinions is supported by substantial evidence
8 and without legal error.

9 **B. New Evidence**

10 Plaintiff contends a psychological evaluation completed in
11 April 2009 by examining psychologist Kayleen Islam-Zwart, Ph.D., and
12 submitted to the Appeals Council after the hearing supports a
13 finding of disability. ECF No. 16 at 16. Plaintiff's argument is
14 unpersuasive. New evidence submitted to and evaluated by the
15 Appeals Council in its review of a case is considered part of the
16 record on review. However, the Appeals Council will not consider
17 evidence unless "it relates to the period on or before the date of
18 the administrative law judge hearing decision." 20 C.F.R. §
19 404.970(b). As clarified in a recent Ninth Circuit case, the
20 Regulations require the Appeals Council to consider evidence
21 submitted after the hearing in determining whether to review the
22 ALJ's decision, "so long as the [new] evidence relates to the period
23 on or before the ALJ's decision." *Brewes v. Commissioner of Social*
24 *Sec. Admin*, 682 F.3d 1157, 1162 n.3 (9th Cir. 2012) (quoting 20
25 C.F.R. § 404.970(b)). Here, the ALJ rendered his decision on
26 December 18, 2008, and Dr. Islam-Zwart's evaluation is dated April
27 10, 2009. Therefore, under the Regulations and recent case law, the
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1 new evidence relied upon by Plaintiff is neither relevant nor
2 reviewable by the Appeals Council.

3 Even assuming the Appeals Council considered the evaluation in
4 question, and Dr. Islam-Zwart's report is considered a part of the
5 record on review by the court, *see Ramirez v. Shalala*, 8 F.3d 1449,
6 1451-52 (9th Cir. 1993), because the opinions expressed are not
7 relevant to the Plaintiff's condition during period at issue, they
8 could not change the outcome of the proceedings below. Therefore,
9 remand for review by the ALJ is not required. *Mayes v. Massanari*,
10 276 F.3d 453, 462 (9th Cir. 2001) (remand not required if new
11 evidence would not change hearing decision).

12 **C. Final RFC Determination**

13 The RFC determination represents the most a claimant can still
14 do despite his or her physical and mental limitations. 20 C.F.R. §§
15 404.1546, 416.945. The RFC assessment is not a "medical issue"
16 under the Regulations; it is an administrative finding based on all
17 relevant evidence in the record, not just medical evidence. *Id.* No
18 special significance may be given to a medical source opinion on
19 issues reserved to the Commissioner. 20 C.F.R. § 416.927(e). The
20 final determination regarding a claimant's ability to perform basic
21 work is the sole responsibility of the Commissioner. 20 C.F.R. §
22 416.946; SSR 96-5p (final RFC is an issue reserved to the
23 Commissioenr).

24 The ALJ's RFC determination reflects a reasonable
25 interpretation of the medical evidence in its entirety, as well as
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1 Plaintiff's credible testimony.⁶ As discussed above, the ALJ's
2 explanation of the weight given the various medical and other source
3 opinions is a rational interpretation of evidence in the entire
4 record. Further, the limitations of light level work with a
5 sit/stand option and superficial and non-collaborative contact with
6 the public and co-workers appropriately address Plaintiff's
7 discounted allegations of problems with anxiety and depression,
8 conditions that have in the past been ameliorated by medication and
9 exercise. (Tr. 31.) The ALJ's RFC is supported by substantial
10 evidence and will not be disturbed by the court.

11 CONCLUSION

12 The Commissioner's determination of non-disability is supported
13 by substantial evidence and free of legal error. Accordingly,

14 IT IS ORDERED:

15 1. Plaintiff's Motion for Summary Judgment, **ECF No. 15**, is
16 **DENIED**.

17 2. Defendant's Motion for Summary Judgment, **ECF No. 20**, is
18 **GRANTED**.

19 The District Court Executive is directed to file this Order and
20 provide a copy to counsel for Plaintiff and Defendant. Judgment
21 shall be entered for Defendant, and the file shall be **CLOSED**.

22 DATED October 29, 2012.

23
24 S/ CYNTHIA IMBROGNO
25 UNITED STATES MAGISTRATE JUDGE
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27 _____
28 ⁶ See *supra*, n.2.